DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF Columbia DEPARTMENT OF HEALTH Petitioner, v. CRYSTAL POOL, INC. and DUNCAN MACKEEVER Respondents	Case Nos.: I-00-10224 I-00-10321

FINAL ORDER

I. Introduction

On June 27, 2000, the Government served a Notice of Infraction (No. 00-10224) upon Respondents Crystal Pool, Inc. and Duncan MacKeever alleging that they violated 21 DCMR 506.2 by failing to comply with an approved erosion and sedimentation plan. The Notice of Infraction alleged that the violation occurred on June 21, 2000 at 5033 Tilden Street, N.W. and sought a fine of $100.00.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Code § 6-2715). Accordingly, on July 25, 2000, this administrative court issued an order finding Respondents in default, assessing the statutory penalty of $100.00 required by D.C. Code § 6-

2704(a)(2)(A) and requiring the Government to serve a second Notice of Infraction pursuant to D.C. Code § 6-2712(f).

On July 31, 2000, the Government served the second Notice of Infraction (No. 00-10321). Respondents also did not answer that Notice within twenty days of service. Accordingly, on November 8, 2000, this administrative court issued a Final Notice of Default finding Respondents in default on the second Notice of Infraction and assessing total statutory penalties of $200.00 pursuant to D.C. Code §§ 6-2704(a)(2)(A) and 6-2704(a)(2)(B). The Final Notice of Default also set December 13, 2000 as the date for an *ex parte* proof hearing, and afforded Respondents an opportunity to appear at the hearing to contest liability, fines, penalties or fees.

On December 5, 2000, this administrative court received a Notice of Appearance from Respondents' counsel, along with a statement that Respondents wished to contest the imposition of fines and penalties in this matter. Due to the high volume of cases set for default hearings December 13, it was necessary to re-schedule the hearing to January 3, 2001. All parties appeared for a hearing on that date. Kendolyn Hodges-Simons, Esq. appeared on behalf of the Government, and Joseph A. Rafferty, Esq. appeared on behalf of Respondents.

Based upon the testimony in the record, my evaluation of the credibility of the witnesses and the documents admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

On June 21, 2000, Peter Nwangwu, an inspector employed by the Department of Health, visited a construction site at 5003 Tilden Street, N.W. in response to a complaint. The site is a residence that was undergoing extensive interior renovation. In addition, a new outdoor swimming pool was being installed, replacing an existing pool. Respondent Crystal Pool, Inc. was installing the pool. Respondent Duncan MacKeever is the president of Crystal Pool.

The construction entrance for the swimming pool project was at the rear of the residence, on 51st Street, N.W. There is an upward slope leading from 51st Street to the residence and to the area of the pool excavation, as shown on Petitioner's Exhibit 100 ("PX-100"), which consists of three photographs taken by Mr. Nwangu on June 21. On June 21, Mr. Nwangu found that the grass leading to the construction entrance had eroded, exposing the bare dirt. No silt fence or other form of erosion protection was present in the area of the construction entrance. As a result, dirt from the construction site and from the slope had washed down the slope into 51st Street, as is clearly visible on PX-100.

Respondents had obtained a building permit for the swimming pool project, which included an approved erosion and sedimentation plan. When he inspected the site, Mr. Nwangu believed that Respondents had failed to comply with the plan in two respects: there was no silt fence preventing runoff from the area of the construction entrance, and Respondents had failed to remove the sediment that had washed from the site onto 51st Street. He based that belief upon his understanding that all approved erosion and sedimentation plans contain standard provisions requiring erosion control measures (including a silt fence) and requiring that all streets be cleared of soil that washes into them. Mr. Nwangu did not have a copy of the approved plan with him at the site, nor did he review the plan before issuing the Notices of Infraction.

Respondents introduced the approved soil and sedimentation plan into evidence. Respondents' Exhibit 200 ("RX-200"). That plan calls for a silt fence to be erected in an area around approximately three sides of the new pool. The plan, however, does not call for a silt fence at the side of the pool closest to the construction entrance, which is the area depicted in PX-100. The plan also provides that "[a]lleys and/or streets/sidewalks shall be kept clean at all times during excavation and construction."

There is insufficient evidence to determine whether the silt fence called for by the approved plan was present. The Government introduced no photographic evidence showing the area where the silt fence was supposed to be. Because he erroneously believed that the approved plan required a silt fence around the entire pool site, Mr. Nwangu's testimony described only the area around the construction entrance.

Respondents did not have a representative present on-site when Mr. Nwangu visited. Mr. Nwangu, however, spoke with the superintendent for the company responsible for the other construction at the site and told him of his concerns. Later on June 21, Mr. Nwangu prepared a Corrective Action Form, Petitioner's Exhibit 101 ("RX-101"), stating that Respondents had failed to comply with an approved erosion and sedimentation plan. The form identified two corrective measures that Respondents needed to take: providing perimeter control by means of a silt fence, and cleaning debris in the public space. The Corrective Action Form was served by mail upon Respondents along with the first Notice of Infraction.

On June 21, Mr. MacKeever learned of Mr. Nwangu's visit from the site superintendent. The superintendent also told him of Mr. Nwangu's concerns about the silt fence and the debris in the street. Mr. MacKeever testified that he moved to address those concerns on the same day, by erecting a silt fence and by arranging for the dirt to be removed from 51st Street that afternoon.[1] His testimony on this point was straightforward and was not contradicted by the Government in any way. That testimony was partially corroborated by Respondents' Exhibit 201 ("RX-201"), which contains a receipt for materials to build a silt fence. The receipt is dated June 21, 2000, at approximately 2:00 PM, showing that Mr. MacKeever moved quickly to address Mr. Nwangu's concerns. I therefore credit Mr. MacKeever's testimony that he promptly erected a silt fence and cleaned the street.

[1] There is no evidence showing whether the silt fence constructed on June 21 was built only in the area near the construction entrance or whether it extended around the entire pool construction site. Accordingly, the building of that silt fence does not permit an inference that no silt fence was present at the pool construction site prior to June 21.

Respondents did not offer any evidence explaining their reasons for failing to file timely responses to the Notices of Infraction.

III. Conclusions of Law

A. Authority to Impose a Fine

At the hearing, Respondents moved to dismiss the charge on the ground that 21 DCMR 506.1, the regulation cited in the Notice of Infraction, does not authorize imposition of a fine for noncompliance with an approved soil and sedimentation plan. I denied that motion for the reasons stated on the record, and now provide the following brief additional explanation of that ruling. Section 506.2 provides that a notice to comply shall be served upon any permittee if an inspection reveals that the permittee has failed to comply with an approved soil and sedimentation plan. A separate subsection of 21 DCMR 506 provides that a permittee who fails to come into timely compliance with the plan after receiving such a notice may be subject to revocation of its building permit or denial of a certificate of occupancy for the project. 21 DCMR 506.4.

Considered in isolation, § 506.2 appears only to prescribe the initial steps that the Government must take to revoke a permit or deny a certificate of occupancy as a sanction for failure to comply with an approved plan. The Government does not seek such a sanction in this case; instead, it seeks a civil fine. That fine is authorized by 16 DCMR 3234.2(c), which classifies a violation of § 506.2 as a Class 3 infraction, and describes the violation as "failure to

comply with an approved soil and sedimentation plan."[2] Section 3234.2(c), therefore, authorizes the imposition of a fine in the circumstances described in § 506.2, *i.e.*, if a permit holder has not complied with an approved soil and sedimentation plan. Although revocation of a permit or denial of a certificate of occupancy are additional options for the Government to pursue in the event of continued non-compliance with an approved plan, the clear intent of § 3234.2(c) is that a civil fine is authorized for any instance of non-compliance with the plan.

B. Sufficiency of the Evidence to Establish a Violation

The Government's theory of the case is that Respondents failed to comply with the approved plan in two respects – by failing to erect or maintain a silt fence and by failing to keep the adjoining street free from dirt that washed from the site. The Notice of Infraction charges only one violation of § 506.2, however, and seeks only a single fine of $100.00. Accordingly, Respondents will be liable for violating § 506.2 if the Government successfully proves either that a required silt fence was not present or that Respondents did not keep the street dean at all applicable times.

The evidence does not establish that Respondents violated the permit's silt fence requirement. The only area of the site photographed by Mr. Nwangu is the section where the plan does not require a silt fence.[3] As noted above, there is insufficient evidence to make any

[2] Class 3 infractions carry a fine of $100 for a first offense. 16 DCMR 3201.1(c).

[3] This case demonstrates why a copy of the actual approved plan is necessary in a case alleging a violation of § 506.2. An inspector's testimony about the "usual" conditions in a plan or his

findings about whether a silt fence was present in the other portions of the pool construction area.

The presence of dirt that washed down the slope onto 51st Street (as shown in PX-100) demonstrates that Respondents failed to comply with the permit's requirement that the street be kept clean "at all times during construction and excavation." Thus, even though Respondents have prevailed on the silt fence issue, the evidence is sufficient to establish that Respondents did not comply with the approved plan and consequently violated § 506.2.

C. The Amount of the Fine

The mitigating evidence in the record is sufficient to authorize a reduction in the fine of $100.00 authorized by 16 DCMR 3234.2(c). Respondents acted promptly to remedy the violation. They also built a silt fence, even though their approved plan did not require one in the area of the construction entrance. There also is no evidence of previous violations by Respondents. These mitigating factors justify reducing the fine to $50.00.

D. Respondents' Failure to Answer the Notices of Infraction

The Civil Infractions Act, D.C. Code § 6-2712(f), requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it on time. If a party can not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must

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"memory" of a specific plan is no substitute for the actual document itself. *Cf.* Fed. R. Evid. 1002-1004 (requiring, with certain limited exceptions, an original document or a duplicate copy in order to prove the contents of the document).

be imposed. D.C. Code §§ 6-2704(a)(2)(A), 6-2712(f). If a recipient fails to answer a second Notice of Infraction without good cause, the penalty doubles. D.C. Code §§ 6-2704(a)(2)(B), 6-2712(f). Demonstrating "good cause" is a two-step process. First, a Respondent must present evidence sufficient to show why it did not file a timely response. Then, it must show that its reason for not filing constitutes "good cause" within the meaning of the statute.

Because they presented no evidence of their reasons for not answering the Notices of Infraction, Respondents failed to satisfy the first requirement. Their counsel presented argument on the point, but arguments of counsel are not evidence and are insufficient by themselves to prove why Respondents did not answer. *Brown v. Hornstein*, 669 A.2d 139, 141 (D.C. 1996). *See* D.C. Code § 1-1510(a)(3)(E) (requiring a reviewing court to "hold unlawful and set aside" any findings of fact that are not supported by substantial evidence in the record). Consequently, there is no lawful basis for making any findings of fact about why Respondents failed to answer the Notices of Infraction.

Even if I considered counsel's arguments as evidence, however, I would rule that Respondents had failed to demonstrate good cause. Counsel argued that Respondents received the first Notice of Infraction by mail several days after they had cleaned the street and erected the silt fence. According to counsel, Respondents believed that they simply needed to remedy the conditions cited by the inspector and that they had done so. Even if there were sufficient evidence establishing that those in fact were Respondents' reasons for not filing, Respondents still would have failed to establish good cause. Their alleged belief that they only needed to

abate the conditions cited by the inspector can not be reconciled with the plain language of the Notice of Infraction form, which states in bold type: "You have been charged with violating the District of Columbia laws stated below. You must indicate below each infraction whether you admit the infraction, admit the infraction with explanation, or deny the infraction." A separate section of the form states, again in bold type: "WARNING: Failure to respond . . . to this Notice within 15 days of the date of service will result in assessment of a penalty equal and in addition to the amount of the fine." There was no basis for Respondents to believe that simply abating the violation excused them from the legal obligation to answer the Notices of Infraction. Their alleged belief was unreasonable and would not constitute good cause for failing to file.

Respondents, therefore, have not demonstrated good cause for their failure to answer, both because they failed to prove their actual reasons for not responding to the Notices of Infraction and because the reasons alleged by their attorney do not constitute good cause. Respondents, therefore, remain liable for the penalties of $200.00 previously imposed by this administrative court as required by D.C. Code §§ 6-2704(a)(2) and 6-2712(f).

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Respondents shall cause to be remitted a single payment totaling **TWO HUNDRED FIFTY DOLLARS ($250.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715). A failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' license or permit pursuant to D.C. Code § 6-2713(f).

FILED 01/29/01

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John P. Dean
Administrative Judge